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No. 84-842

In The

Supreme Court of the United States

October Term, 1984

JACK FAUCETT ASSOCIATES, INC., METROPHONE, INC., McKINLEY, SCHMIDTLEIN & MITCHELL, COHEN & ANNAND, P.C., JEROS TACKLE, INC., RAMPART BROKERAGE CORP., AND LARKIN GENERAL HOSPITAL, LTD.,

Petitioners,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

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QUESTION RESTATED

Petitioners seek to have this Court review the interlocutory decision of the United States Court of Appeals for the District of Columbia Circuit reversing an order of the district court that had determined without trial every liability issue in this case by application of offensive collateral estoppel based upon a judgment in *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 76 Civ. 2512 (WCC) (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984). The judgment in *Litton* imposed antitrust liability upon AT&T on the theory that positions AT&T advocated on issues of telecommunications regulation in public debate and in pleadings before the FCC were not protected by the *Noerr-Pennington* doctrine or were baseless and sham.

The issue presented by the Petition in this case is:

> Whether this Court should review the decision of the Court of Appeals where:
>
> (1) the sole aspect of the Court of Appeals' decision that Petitioners have properly challenged—that offensive collateral estoppel was inappropriate because the trial court in *Litton* erroneously excluded "crucial evidence" that could lead a second jury to reach a different result—is simply an application of well established principles to the facts of this case;
>
> (2) the Question Presented by Petitioners does not raise for the Court's review other independent grounds upon which the Court of Appeals based its determination that offensive collateral estoppel would be inappropriate—namely (a) that the *Litton* judgment is inconsistent with the decision in *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336, 1381 (D.D.C. 1981), dismissing identical antitrust charges against AT&T on the ground that the challenged conduct was protected by the *Noerr-Pennington* doctrine and that the sham exception to that doctrine was inapplicable; and (b) that the scope of the estoppel ordered by the district court exceeded the scope of the issues actually liti-

gated and decided in *Litton*—and those grounds also reflect an application of well-established principles to the facts of this case; and

(3) there are additional grounds, which the Court of Appeals did not reach, which have led three other district courts to hold that application of collateral estoppel based upon *Litton* is inappropriate.

STATEMENT REQUIRED BY RULE 28.1

Respondent American Telephone and Telegraph Company ("AT&T") has no parent company. Respondents AT&T Technologies, Inc. (formerly Western Electric Company, Incorporated) and Bell Telephone Laboratories, Incorporated are wholly-owned subsidiaries of AT&T. In addition to other wholly-owned subsidiaries, AT&T has ownership interests either directly or through wholly-owned subsidiaries in Cincinnati Bell Incorporated; the Cuban American Telephone and Telegraph Company, Inc.; Ing. C. Olivetti and C., S.P.A.; Gold Star Fiber Optics Co., Ltd.; Western Electric Saudi Arabia, Ltd.; Gold Star Semiconductor, Ltd.; Communications Software Development, Inc.; AT&T and Philips Telecommunications, B.V.; and ShareTech, Inc.

Respondents Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company and Wisconsin Bell Inc. (formerly the Wisconsin Telephone Company) are all wholly-owned subsidiaries of American Information Technologies Corporation and have no subsidiaries. The Ohio Bell Telephone Company is a wholly-owned subsidiary of American Information Technologies Corporation and has ownership interests in The Chillicothe Telephone Company and The Champaign Telephone Company. American Information Technologies Corporation has no parent company. In addition to wholly-owned subsidiaries,* American Information Technologies Corporation has an ownership interest in Northern Information Technology, Inc.

Respondents The Bell Telephone Company of Pennsylvania, The Diamond State Telephone Company, The Chesapeake and

*Bell Communications Research Corp. is wholly-owned jointly by American Information Technologies Corporation, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, The Pacific Telesis Group, Southwestern Bell Corporation and U S WEST, Inc., either directly or through wholly-owned subsidiaries.

Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, and New Jersey Bell Telephone Company are all wholly-owned subsidiaries of Bell Atlantic Corporation and have no subsidiaries. Bell Atlantic Corporation has no parent company. In addition to wholly-owned subsidiaries, Bell Atlantic Corporation has an ownership interest in Telecommunication Specialists, Inc.

Respondents South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company are wholly-owned subsidiaries of BellSouth Corporation and have no subsidiaries other than wholly-owned subsidiaries. BellSouth Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondents New England Telephone and Telegraph Company and New York Telephone Company are wholly-owned subsidiaries of NYNEX Corporation. New York Telephone has no subsidiaries other than wholly-owned subsidiaries and New England Telephone has no subsidiaries. NYNEX Corporation has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondent Pacific Bell (formerly The Pacific Telephone and Telegraph Company) is a subsidiary of The Pacific Telesis Group and has no subsidiaries other than wholly-owned subsidiaries. The Pacific Telesis Group has no parent company and, other than Pacific Bell, has no subsidiaries other than wholly-owned subsidiaries.

Respondent Southwestern Bell Telephone Company is a wholly-owned subsidiary of Southwestern Bell Corporation and has no ownership interests in any companies other than wholly-owned subsidiaries. Southwestern Bell Corporation has no parent com-

pany and has no subsidiaries other than wholly-owned subsidiaries.

Respondents The Mountain States Telephone and Telegraph Company, Pacific Northwest Bell Telephone Company, and Northwestern Bell Telephone Company are all wholly-owned subsidiaries of U S WEST, Inc. and have no subsidiaries other than wholly-owned subsidiaries. U S WEST, Inc. has no parent company and has no subsidiaries other than wholly-owned subsidiaries.

Respondent The Southern New England Telephone Company ("SNET") has no parent company. In addition to wholly-owned subsidiaries, SNET has an ownership interest in SONECOR Credit Corporation.

Respondent Cincinnati Bell Telephone Co. (formerly Cincinnati Bell Inc.) is a wholly-owned subsidiary of Cincinnati Bell Inc. Cincinnati Bell Enterprises Inc. is a wholly-owned subsidiary of Cincinatti Bell Inc. Cincinnati Bell Supply Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 49 percent partner in a joint venture with Anixter Bros., Inc. Cincinnati Bell Cellular Systems Company, a wholly-owned subsidiary of Cincinnati Bell Enterprises Inc., is a 46 percent partner in a joint venture with American Information Technologies Corporation.

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v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

Petitioners seek to have this Court review the decision of the Court of Appeals for the District of Columbia Circuit in *Jack Faucett Assoc., Inc.* v. *American Tel. & Tel. Co.*, 744 F.2d 118 (D.C. Cir. 1984) ("*Faucett*"),[1] in which the Court of Appeals, on an interlocutory appeal, reversed an order of the district court that had resolved without trial every liability issue raised in this case by application of offensive collateral estoppel based upon the jury verdict in *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 76 Civ. 2512 (WCC) (S.D.N.Y. 1981), *aff'd*, 700 F.2d 785 (2d Cir. 1983), *cert. denied*, 104 S.Ct. 984 (1984) ("*Litton*"). As will be developed below, this case does not warrant review under the standards set forth in this Court's Rules.

[1]For the convenience of the Court, this Opposition will refer to the slip opinion of the decision contained in Petitioners' Appendix A.

COUNTERSTATEMENT OF THE CASE

Petitioners' complaints seek to recover treble the amount of all charges paid to Respondents from 1970 through 1978 for protective connecting arrangements ("PCAs") required under tariffs on file with the FCC and with state regulatory commissions all over the United States for interconnection of customer-provided key telephone systems and private branch exchanges ("PBXs") with the telephone network. The theory of these complaints is that the tariff requirement for a PCA was filed and maintained by Respondents wholly without justification, in bad faith, for anticompetitive purposes. In order to understand these allegations and the issues raised by the instant Petition, a review of the regulatory history of practices in the telephone industry pertaining to the use and interconnection of customer-provided equipment is helpful.

A. The Regulatory Background

From the very beginning of the telephone industry in the 19th century, telephone service was provided in this country on a complete end-to-end basis with the telephone companies owning and maintaining all of the equipment and facilities necessary to provide telephone service. Telephone instruments—the telephone set, key telephone systems and PBXs—were viewed by regulatory authorities as part of the "telephone network" itself and no telephone user was permitted to substitute his own equipment for that provided by the telephone companies.[2]

In addition to prohibiting substitutions of telephone company equipment, the telephone companies historically prohibited the attachment of any devices to the telephone instrument. This "for-

[2]Numerous state regulatory cases upheld the prohibition against customer substitution of telephone-company provided equipment. *See, e.g., Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 60 P.U.R.3d 363 (Minn. R.R. & Whse Comm'n 1965), *aff'd*, 70 P.U.R.3d 97 (Minn. Dist. Ct. 1966); *City of Los Angeles* v. *Southern California Tel. Co.*, 2 P.U.R. (n.s.) 247, 249 (Cal. R.R. Comm'n 1933).

eign attachment" prohibition was modified over time by administrative and judicial decisions holding, on a case-by-case basis, that a telephone user could attach certain harmless devices such as a plastic cup to the telephone instrument.[3] Most of these approved attachments were mechanically or acoustically attached. In the few instances that regulatory agencies approved attachments that were electrically connected to the network, the regulatory agencies required that the connection be made through a PCA that was owned, installed and maintained by the local telephone company.[4]

In *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968), the FCC, abandoning the former case-by-case analysis of attachments, declared that the general foreign attachment prohibition in AT&T's interstate tariffs was unlawful, and ordered AT&T to file new tariffs that would permit the attachment of "harmless" devices. The scope of the initial *Carterfone* decision was clarified in subsequent FCC orders holding that the *Carterfone* decision did not disturb the existing end-to-end nature of telephone service. It dealt only with *attachments* to the telephone network, not *replacements* of integral parts of that network such as telephone sets, key telephone systems and PBXs;[5] and even with respect to attachments, the decision was not intended to preclude the telephone companies

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[3]*See, e.g., Hush-A-Phone Corp.* v. *United States*, 238 F.2d 266 (D.C. Cir. 1956), *on remand*, 22 F.C.C. 112 (1957); *Jordaphone Corp.* v. *American Tel. & Tel. Co.*, 18 F.C.C. 644 (1954).

[4]*Use of Recording Devices in Connection with Telephone Service*, 11 F.C.C. 1033, 1048-49 (1947) (prescribing the use of "adequate connecting arrangements" designed "to protect against impairment of the telephone service . . . [or] harmful voltages or currents which might be injurious to person or plant").

[5]*Carterfone*, 14 F.C.C.2d 571, 572 (1968) (decision on reconsideration); *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *recon. denied*, 18 F.C.C.2d 871, 872 (1969); *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972).

from taking reasonable efforts to protect the integrity of service.[6]

In compliance with the *Carterfone* decision, AT&T filed the revised tariffs that are the focus of Petitioners' complaints. These "post-*Carterfone*" tariffs were filed with the FCC and state regulatory agencies in late 1968. The revised tariffs went well beyond the requirements of the *Carterfone* decision. They permitted connection to the telephone network of any device a telephone user might desire, so long as any direct electrical connection was made through a PCA—the same approach that the FCC itself had previously prescribed for such attachments from 1947 onward. Moreover, AT&T undertook in the post-*Carterfone* tariffs to redefine the telephone network to terminate in a network control signalling unit (NCSU) to be incorporated within the PCA.[7] The tariffs thus permitted any telephone user, not only to *attach* his own devices to his Bell System telephone set, but also, for the first time, to *substitute* behind the PCA his own telephone set, PBX or key telephone system.

Several petitions to reject were filed in response to these post-*Carterfone* tariffs. Based upon an informal investigation of the tariffs by the FCC's Common Carrier Bureau, the FCC permitted the tariffs to go into effect without invoking the statutory suspension period and without initiating a formal investigation. *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968). In so doing, the Commission expressly and unequivocally rejected the principal objection to the tariffs—that

[6] *Carterfone*, 13 F.C.C.2d at 424, 426 (inviting AT&T to "submit new tariffs which will protect the telephone system against harmful devices").

[7] Network control signalling controls the operation of switching machines in the telecommunications network. Thus, network control signals initiate a call, dial the desired number, ring the called station, complete the connection to the called station, notify busy conditions, disconnect when the conversation is finished, and bill for the call. *See AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 607 (1968).

is, the claim that the carrier-provided PCA requirement was a violation of the *Carterfone* decision itself. On this point the Commission stated (*id.* at 609-10):

> "We believe that this particular objection is based upon a misconstruction of what we decided in *Carterfone*. We were concerned in that case with the lawfulness of tariff provisions that prohibit a customer from making harmless interconnection of his terminals or systems with the message toll telephone system of the telephone companies. As we have heretofore stated, *this telephone system includes the telephone instrument which performs the network control signaling functions* for message toll telephone service. We were therefore concerned with what could be connected or attached to this telephone system. *Our decision in Carterfone does not hold that a customer may substitute his own equipment or facilities (whether it be telephone instruments, loops, poles, or central office equipment) for that furnished by the telephone company* in providing message toll telephone service as that service is defined in the tariff. *Our decision dealt with interconnections and not replacements of any part of the telephone system.*" (Emphasis supplied.)

During the first four years following *Carterfone*, the FCC consistently repeated this finding and, on at least five separate occasions, expressly held that the post-*Carterfone* tariffs did not violate the *Carterfone* decision.[8]

After permitting the post-*Carterfone* tariffs to become effective, the FCC also began considering—albeit with deliberation—whether it should move beyond *Carterfone* to some more unrestricted form of interconnection or even to a redefinition of the basic telephone network. In 1969, the FCC convened a panel of the National Academy of Sciences to study the problem, resulting

[8] *AT&T, "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 609-10 (1968), *recon. denied*, 18 F.C.C.2d 871, 872 (1969); *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972) ("We have already expressly ruled that the tariff requirement that the carrier be the sole supplier of the NCSU . . . does not violate *Carterfone*"); *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 206 (1974); *Mebane Home Telephone Co.*, 53 F.C.C.2d 473, 476 (1975).

in a 1970 report which concluded that the post-*Carterfone* tariffs were reasonable and that any program involving certification of equipment, which would replace the existing hardware protection, would have to be extremely thorough and probably very expensive;[9] in 1971, the FCC established an Advisory Committee of industry representatives to work out standards for a certification program; and in 1972, it established FCC Docket 19528 and convened a Joint Board of federal and state regulators under 47 U.S.C. §410 to study the whole question of equipment interconnection.[10]

Meanwhile, several of the state regulatory commissions instituted their own investigations of the post-*Carterfone* tariffs. These investigations generally resulted in findings that the post-*Carterfone* tariffs were reasonable and appropriate. For example, in July 1969 the New York Public Service Commission, after an evidentiary hearing, found that the PCA for customer-provided equipment was "absolutely necessary" to protect against the hazards to telephone company equipment and personnel and the degradation of service to other customers that can result from interconnection of customer-provided equipment. *New York Tel. Co.*, 79 P.U.R.3d 410, 417 (N.Y. Pub. Serv. Comm'n 1969). More than a dozen regulatory decisions from other States are in full accord with this New York decision finding that the PCA was a reasonable method of protecting the network from harm.[11]

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[9] Computer Science and Engineering Board of the National Academy of Sciences, *Technical Analysis of Common Carrier/User Interconnections Area* (June 10, 1970).

[10] *Interstate and Foreign MTS and WATS* (Docket 19528), 35 F.C.C.2d 539 (1972).

[11] *See, e.g., Slavin* v. *Southwestern Bell Tel. Co.*, Case No. 17,946, p. 18 (Mo. Pub. Serv. Comm'n Feb. 26, 1975); *Glusing* v. *C & P Tel. Co.*, 1974 Md. P.S.C. 377, 385, 386 (Md. Pub. Serv. Comm'n 1974); *Blackwood* v. *Southwestern Bell Tel. Co.*, Cause No. 25195, Order No. 106999 (Okla. Corp. Comm'n August 8, 1974) and Referee's Report (June 20, 1974); *Approval of South Central Bell Tel. Co. General Exchange Tariff Revisions*, Docket No. U-5132 (Tenn. Pub. Serv. Comm'n Jan. 30, 1969); *Sound, Inc.* v. *Northwestern Bell Tel. Co.*, Docket No. C-5-62 (Iowa State Comm. Comm'n July 23, 1975), *recon. denied*,

(Footnote continued on following page)

While the States were endorsing the need for network protection, the whole question of certification of terminal equipment as a possible alternative became a very controversial economic and political issue. Many state regulators saw certification, and even the post-*Carterfone* tariffs, as a threat to the existing rate structure for telephone service—and ultimately to the principle of universal telephone service—in their respective States. The States feared that the widespread use of customer-provided terminal equipment, particularly PBXs and key telephone systems which were tariffed in many states at premium rates to subsidize local residential telephone service,[12] would reduce the contribution made by terminal equipment rentals to local telephone company operating revenues and result in increases in local and intrastate telephone rates, detrimental to the goals of low-cost universal telephone service. They opposed liberalized interconnection unless and until a way was found to accommodate customer-owned terminal equipment with the maintenance of the existing rate structure for basic telephone service.[13] Thus they

(Footnote continued from previous page)
(Sept. 9, 1975); *Michigan Bell Tel. Co.*, Case Nos. U-3327, U-3492 (Mich. Pub. Serv. Comm'n Feb. 16, 1970); *Hawaiian Tel. Co.*, Decision and Order No. 2769, Docket No. 1865 (Haw. Pub. Utils Comm'n June 16, 1971); *Delzell* v. *Pacific Tel. & Tel. Co.*, Case Nos. 8917 and 8991, Decision No. 77203 (Cal. Pub. Utils Comm'n May 12, 1970); *Associated Communications Serv.* v. *Pacific Tel. & Tel. Co.*, Decision No. 81159, Case Nos. 9411, 9414, 9417 (Cal. Pub. Utils Comm'n Mar. 13, 1973); *Petition of Cassella*, No. 3776 (Vt. Pub. Serv. Bd Sept. 23, 1974); *Application of August H. Allen for Exemption from Tariff of Northwestern Bell Tel. Co.*, App. No. 29169 (Neb. Ry. Comm'n Dec. 20, 1971).

[12]*See, e.g., GSA* v. *New York Tel. Co.*, 63 P.U.R.3d 451, 462-63 (N.Y. Pub. Serv. Comm'n 1965); *General Tel. Co.*, 80 P.U.R.3d 2, 74-76 (Cal. Pub. Utils Comm'n 1969).

[13]These concerns were expressed most strongly by the National Association of Regulatory Utility Commissioners ("NARUC") in proceedings before the FCC itself. For example, in early 1972, the NARUC Subcommittee on Communication Interconnection told the FCC it opposed certification because it would "benefit a very affluent class of users" with "the general public . . . forced to shoulder a greater

(Footnote continued on following page)

filed comments opposing certification in FCC Docket 19528, sought and obtained some congressional support for their position, introduced legislation, and in various ways urged the telephone companies to resist certification until the economic concerns of the state regulators were considered.

After some uncertainty and debate within the Bell System on the position AT&T should take with regard to the certification issue in Docket 19528, AT&T, in March 1973, adopted the same position as the States and determined to oppose certification until the ramifications of increased competition in telecommunications could be fully examined. This position was first publicly announced by AT&T's Chairman, John deButts, at the AT&T annual shareholders meeting in April 1973. In September 1973, Mr. deButts made a speech at the annual convention of NARUC in which he laid out in some considerable detail the reasons for AT&T's position. AT&T filed its formal comments in FCC Docket 19528 opposing certification on these grounds in October 1973.

Early in 1974, the leadership of the FCC changed, first with the appointment of a new Chief of the Common Carrier Bureau on January 1, 1974, and shortly thereafter with the confirmation of a new Commission Chairman. Although this new leadership did not immediately repudiate the FCC's earlier consistent findings that the post-*Carterfone* tariffs complied with current FCC policy —indeed, in testimony before the United States Senate, the new Chairman took credit for maintaining the tariffs[14]—the Commission began rapidly to circumvent state regulatory opposition to certification. In January 1974, the FCC announced that it was

(Footnote continued from previous page)
economic burden" (Letter of January 6, 1972 from NARUC Staff Subcommittee to Robert Sims, Chairman, Subcommittee on Procedures and Enforcement, PBX Standards Advisory Committee, Federal Communications Commission).

[14]*Hearings on Review of the FCC Before the Subcommittee on Communications of the Senate Committee on Commerce*, 93d Cong., 2d Sess. at 13 (March 26, 1974) (Statement of Hon. Richard E. Wiley) ("*We have continued to require* that the connecting arrangements and NCSU equipment must be provided by the Bell System") (emphasis supplied).

preempting any exercise of state regulatory power over interconnection that was inconsistent with the interconnection practices permitted by the FCC;[15] and in April 1974, the FCC removed the economic issues from the Joint Board proceeding on certification and established a new docket for economic issues that would have no State participation.[16]

In the Spring of 1975 the Federal-State Joint Board issued its proposed certification plan—one which was limited to data and ancillary devices and which specifically continued the PCA requirement for telephone sets, key telephone systems and PBXs (the equipment at issue in *Litton* and *Faucett*).[17] The FCC essentially adopted this recommended certification plan in the Fall of 1975, but sent back to the Joint Board the question whether the certification program should be expanded to include main station telephone sets, key telephone systems and PBXs.[18] The Joint Board again affirmatively rejected certification of this equipment.[19] The FCC refused to accept that recommendation and in March 1976 ordered an expansion of the certification program to include main station telephone sets, key telephone systems and PBXs.[20] That order became effective in October 1977 upon this Court's denial of certiorari.[21]

[15]*Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[16]*Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnection, Jurisdictional Separations and Rate Structures* (Docket 20003), 46 F.C.C.2d 214 (1974) (Notice of Inquiry).

[17]Recommended First Report and Order of the Federal-State Joint Board (Docket 19528), 53 F.C.C.2d 221 (1975).

[18]*Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593, 599-600 (1975) (First Report and Order).

[19]Recommended Second Report and Order of the Federal-State Joint Board (Docket 19528). *See* 58 F.C.C.2d 736, 737 (1976).

[20]*Interstate and Foreign MTS and WATS*, 58 F.C.C.2d 736, 746-47 (1976) (Second Report and Order).

[21]*See Interstate and Foreign MTS and WATS*, 67 F.C.C.2d 1255, 1256 (1978) (Third Report and Order).

The 1975-1976 FCC decisions that resulted from this activity essentially rewrote the 1968-1973 history of the post-*Carterfone* tariffs. In these decisions, the FCC simply ignored its repeated holdings that *Carterfone* dealt only with *attachments* to, not *substitutions* for, network equipment and facilities; the 1975-1976 decisions made no reference to the fact that the FCC had previously held that the post-*Carterfone* tariffs did not violate the *Carterfone* decision or the fact that the FCC's Notice of Inquiry in Docket 19528 had specifically excluded any issue concerning whether the tariffs violated *Carterfone*;[22] and the 1975-1976 decisions simply treated as non-existent the network definition issue out of which the telephone company-provided NCSU arose, while rejecting out-of-hand the related economic issues that had dominated the certification proceedings during the 1972-1974 period. Indeed, in contrast to the Recommended Decisions of the Joint Board, the FCC's 1975-1976 decisions made it appear that the economic issues were of trivial importance at best, and that a certification program for all types of equipment could and should have been adopted by AT&T following the *Carterfone* decision.

The result of all this was not only the establishment of what is now called the FCC's registration program but also the initiation of a number of antitrust actions against AT&T. This litigation was based upon the theory that, because the FCC ultimately ordered certification, such a program should have been established by AT&T itself following the *Carterfone* decision or that, in any event, the Bell System's filing of the post-*Carterfone* tariffs was in bad faith and its opposition to certification was a sham. The Government included such charges in its case. *United States* v. *American Tel. & Tel. Co.*, C.A. No. 74-1698 (D.D.C.). And a

[22]The FCC's 1972 Notice of Inquiry stated (35 F.C.C.2d at 542):

> "[T]his proceeding will not be concerned with any question relating to whether or not modification should be made in [the *Carterfone*] decision or in any of the provisions in the interstate MTS and WATS tariff provisions filed in compliance therewith."

number of private suits involving similar allegations were filed, including the *Litton* case.[23]

B. The Government Case

In the Government case, AT&T filed a motion to dismiss the equipment interconnection charges under Rule 41(b) at the close of the Government's case-in-chief. *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981).[24] Although denying AT&T's motion in part, Judge Harold H. Greene rejected the Government's theory that AT&T's opposition to certification before the FCC constituted a violation of the antitrust laws. Judge Greene held that such conduct was constitutionally protected under the *Noerr-Pennington* doctrine and that there was no basis for invocation of the sham exception to that doctrine (524 F. Supp. at 1354, 1363). Accordingly, Judge Greene ordered that these charges be stricken and held that AT&T did not have to address them in its defense (*id.* at 1381).

[23]Petitioners, quoting AT&T's 1983 petition for certiorari in *Litton*, implicitly represent (Pet. at 20) that at least 17 private treble damage cases raising the same issues as those resolved by the Court of Appeals still remain pending today. This representation is misleading. Most of those cases have now been settled. As of the date of this Opposition, only four cases of the seventeen are still pending. In three of these four cases the courts have already ruled against offensive collateral estoppel resting in part on grounds not raised by Petitioners. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984). In *General Dynamics Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-C-7941 (N.D. Ill.), a motion for application of collateral estoppel is presently pending. In addition, a case raising allegations similar to those herein was filed on December 7, 1984, *Shimazaki Comm., Inc.* v. *American Tel. & Tel. Co.*, No. 84 Civ. 8804 (S.D.N.Y.), but that case is barred by the statute of limitations.

[24]Although the Government case was ultimately concluded by a settlement agreement between the Government and AT&T, as the Court of Appeals noted (App. A at 6a), "the rulings [granting in part AT&T's Motion to Dismiss] and record developed prior to that settlement were fully litigated and are highly relevant here."

C. The *Litton* Case

In *Litton*, a marketer of PBXs and key telephone systems claimed injury arising from the PCA requirement in the post-*Carterfone* tariffs and contended particularly that AT&T's opposition to certification had delayed the ultimate FCC decision removing the PCA requirement for PBXs and key telephone systems. In contrast to Judge Greene's decision in the Government case, the *Litton* trial court permitted the case to go to the jury on the theory that AT&T's post-*Carterfone* tariff filing and opposition to certification fell within the sham exception to the *Noerr-Pennington* doctrine, and the jury returned a verdict against AT&T on that theory. The Second Circuit affirmed that verdict, on the ground, first, that the *Noerr-Pennington* doctrine was not even applicable to the conduct involved because such conduct sought to preserve an existing anticompetitive situation (700 F.2d at 806-09) and, second, that if it were applicable, the evidence supported the jury's finding that AT&T's conduct fell within the sham exception to the doctrine (*id.* at 809-12).

D. The Present Case

The first of the class actions consolidated herein was filed on July 31, 1981, raising claims similar to those alleged in *Litton*. Petitioners filed their motion for collateral estoppel on April 5, 1983, seeking estoppel on nine propositions which, taken together, would encompass Petitioners' entire liability case. In its order, the district court granted Petitioners' motion in its entirety, estopping defendants on every proposition as to which estoppel was sought (App. C at 41a-42a). However, reflecting its own doubt about the correctness of its decision, the district court *sua sponte* certified an interlocutory appeal pursuant to 28 U.S.C. §1292(b) (*id.* at 34a). On August 15, 1983, the Court of Appeals granted AT&T's Petition for Permission to Appeal. Following briefing, oral argument and a round of supplemental briefing, the Court of Appeals issued its decision on September 11, 1984.

The Court of Appeals found that "[o]n the record established and the reasons articulated by the district court, the application of offensive collateral estoppel fell below the minimum safeguards which must be present ere a party can be denied the right to present all of its defenses" (App. A at 2a). The Court of Appeals based this finding on three grounds.

First, the Court found that Respondents had been deprived of the requisite "full and fair" opportunity to litigate their liability in *Litton* because the *Litton* trial court had excluded evidence of state regulatory findings that the post-*Carterfone* tariffs were "reasonable" and "absolutely necessary" to protect the network from harm—evidence that the Second Circuit had found to have been erroneously excluded in *Litton* (App. A at 17a-18a). Applying the standards established in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 333 (1971), the Court of Appeals concluded that collateral estoppel was inappropriate because the excluded state regulatory findings constituted "crucial evidence" in the context of the issues in the case at bar that "could lead a jury in a new trial to reach a different result" (App. A at 21a).[25]

Second, and independent from its analysis of the "crucial evidence" issue, the Court of Appeals found that the conflicting *Noerr-Pennington* determinations in *Litton* and the Government case represented a "classic case of inconsistent determinations" (App. A at 26a-27a). Based upon this Court's decision in *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 332 (1979), that application of offensive collateral estoppel would be unfair where the judgment relied upon is inconsistent with other determinations of the same issue in other cases, the Court of Appeals concluded that

[25]Although strongly argued to it by Respondents, the district court did not even address the erroneous exclusion of state regulatory decisions in its opinion and thus did not consider whether AT&T was deprived of crucial evidence under the standards established in *Blonder-Tongue Laboratories*.

the inconsistency between *Litton* and Judge Greene's findings precluded application of offensive collateral estoppel (*id.* at 27a).

Finally, the Court of Appeals found that the estoppel applied by the district court exceeded the scope of the issues actually litigated in *Litton*. The Court of Appeals held (App. A at 27a-28a) that because the definition of the relevant market in *Litton* was not actually litigated, but instead was the subject of stipulation, collateral estoppel could not appropriately be applied to that definition. The Court of Appeals also held (App. A at 28a-29a) that the district court abused its discretion in granting collateral estoppel with respect to the claim that AT&T delayed in providing and installing PCAs for Litton in the absence of any showing by Petitioners that such conduct was involved in this case as well.

On October 9, 1984, Petitioners filed a petition seeking rehearing with a suggestion for rehearing *en banc*. The petition for rehearing and the suggestion for rehearing *en banc* were unanimously denied on October 22, 1984, with not a single Circuit Judge requesting a vote on the suggestion for rehearing *en banc* (App. B at 31a-32a).

REASONS FOR DENYING THE WRIT

The Question Presented in the Petition neither possesses national importance nor otherwise is appropriate for review by this Court. The sole aspect of the Court of Appeals' decision that Petitioners have properly challenged—that collateral estoppel was inappropriate because the trial court in *Litton* erroneously excluded "crucial evidence" that could lead a second jury to a different result—involves simply an application of well established principles to the facts of this case. Review of that kind of question plainly is not warranted. Nor, as will be shown below, should the Court review the independent and alternative ground of the Court of Appeals' decision—that collateral estoppel is inappropriate because the decision in *Litton* conflicts with the decision in *United States* v. *American Tel. & Tel. Co.* That ground is not even properly challenged in Petitioners' Question Presented and, in any event, also involves nothing more than an application of well

established principles to the facts of this case. Finally, review here is not appropriate because the Court of Appeals' decision is supported by other alternative grounds, which the Court of Appeals did not have to reach, including grounds relied upon by several district courts that have denied motions to give offensive collateral estoppel effect to *Litton*.[26]

I. THE COURT OF APPEALS CORRECTLY FOLLOWED THE DECISIONS OF THIS COURT IN CONCLUDING THAT IMPOSITION OF OFFENSIVE COLLATERAL ESTOPPEL WOULD BE UNFAIR WHERE DEFENDANTS HAD BEEN DEPRIVED OF THE OPPORTUNITY TO INTRODUCE "CRUCIAL EVIDENCE" IN *LITTON*.

Petitioners seek this Court's review of the question whether the Court of Appeals correctly determined that offensive collateral estoppel was inappropriate in the present case because AT&T was deprived of the opportunity to introduce "crucial evidence" in *Litton* showing that state regulatory commissions had approved the PCA requirement as reasonable. Petitioners raise four arguments in support of review of this issue by this Court (Pet. at 7-14).

The primary argument asserted by Petitioners is that the Court of Appeals applied an "erroneous legal standard" (Pet. at 9) which, Petitioners contend, effectively precludes application of

[26]Motions for collateral estoppel based upon *Litton* have now been considered in five cases, and those motions have been completely denied in four of those cases and partially denied in the fifth.

In addition to the decision of the Court of Appeals in *Faucett*, collateral estoppel motions have been denied in their entirety in *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); and *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984). In *Selectron, Inc.* v. *American Tel. & Tel. Co.*, 587 F. Supp. 856 (D. Or. 1984), the district court granted in part and denied in part plaintiffs' motion for collateral estoppel. However, that case relied heavily on the rulings of the district court in *Faucett*, which have now been rejected by three other district judges, as well as the Court of Appeals. The *Selectron* case was settled while a motion for an interlocutory appeal of the collateral estoppel ruling was pending in the district court.

offensive collateral estoppel in the District of Columbia Circuit (Pet. at 9, 14). Petitioners assert that the Court of Appeals has held that collateral estoppel should not be applied whenever there is a "mere possibility" that any piece of evidence excluded in one trial could cause a jury in a second trial to reach a different result (Pet. at 9, 10).

Petitioners' characterization distorts the decision below. The Court of Appeals repeatedly made clear that the standard it was applying—the standard set forth by this Court in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 333 (1971)—was whether AT&T had been deprived of the opportunity to introduce "crucial evidence" in *Litton* that "could lead a jury in a new trial to reach a different result" (App. A at 16a-17a, 20a, 21a).

Contrary to Petitioners' argument, the Court of Appeals did not apply this standard in a way that will preclude application of offensive collateral estoppel in the future. The court did not rule that *any* relevant evidence excluded from the prior trial would be sufficient to avoid collateral estoppel. Rather, it began with the fact that the Second Circuit itself had recognized that the trial court in *Litton* had erred in excluding a state regulatory decision approving the PCA requirement as "reasonable" and "necessary."[27] The *Faucett* court then considered the relationship of the excluded evidence of state regulatory approvals to the issues in *Litton* and the issues to be precluded in the present case and determined that the excluded evidence was indeed "crucial" (App. A at 18a, 20a).

The Court of Appeals' treatment of this issue was eminently sound. The issue in *Litton* (as well as in this case) concerned

[27] In *Litton* (700 F.2d at 819), the Second Circuit said with respect to the trial court's exclusion of the decision in *New York Tel. Co.*, 79 P.U.R.3d 410 (N.Y. Pub. Serv. Comm'n 1969):

> "We view this evidence as arguably probative of AT&T's position, and find it difficult to justify the exclusion of this decision in light of the admission of various FCC rulings."

whether AT&T acted in bad faith in filing tariffs requiring the use of a PCA and thereafter maintained those tariffs in bad faith by making "baseless" claims that PCAs were necessary to protect the telecommunications network from harm. The decisions of state regulatory agencies expressly finding such tariffs to be reasonable and necessary to protect the network from harm were relevant and, indeed, "crucial" to a balanced presentation of the evidence and a fair resolution of that issue. The *Faucett* court was thus plainly correct in holding that preclusion of a full trial on the merits of this issue would be unfair to AT&T.

Second, Petitioners argue (Pet. at 10) that the decision of the Court of Appeals in this case conflicts with the decision of the Second Circuit in *Litton* that the trial court's error in excluding state regulatory decisions did not justify reversal of the judgment in that case. That, of course, is not the issue here. As the Court of Appeals stated (App. A at 21a), quoting the Restatement (Second) of Judgments §29 comment j:

> "[T]he question is not whether a prior determination should be set aside but whether it should be treated as conclusive for further purposes."

Accord, *Carr* v. *District of Columbia*, 646 F.2d 599, 606 n.35 (D.C. Cir. 1980); *1776 K Street Associates* v. *United States*, 602 F.2d 354, 358 (Ct. Cl. 1979), *cert. denied*, 447 U.S. 905 (1980). Indeed, the Court of Appeals explicitly stated (App. A at 20a) that its conclusion on this point does *not* conflict with the Second Circuit's decision in *Litton*.[28]

Third, Petitioners assert (Pet. at 10-11) that the trial court in *Litton* did not exclude evidence which can be considered "crucial," because the trial court only excluded a single state regulatory decision. Petitioners claim that the Court of Appeals

[28]The Second Circuit predicated its refusal to reverse the jury verdict, in spite of its finding of error, on the difficulty of achieving perfection in a long and complicated proceeding (700 F.2d at 819). The Restatement (Second) of Judgments §29 comment g cautions against extending "the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality."

"erroneously speculated" in stating that AT&T intended to introduce other similar state regulatory decisions had the *Litton* court admitted the *New York Tel. Co.* decision (Pet. at 10). Petitioners' contentions are wholly without merit. To begin with, whether the excluded evidence consisted of one exhibit or one hundred exhibits is not determinative of whether or not the evidence is "crucial." *See, e.g., Butler* v. *Stover Bros. Trucking Co.*, 546 F.2d 544, 551 (7th Cir. 1977) (present availability of testimony of one witness excluded from prior trial precluded application of collateral estoppel).

Moreover, contrary to Petitioners' claim, there is ample support for the Court of Appeals' conclusion that the trial court's ruling in *Litton* had the practical effect of excluding other state decisions upholding the PCA requirement. AT&T had included several other such state regulatory decisions on its exhibit list and pretrial filings in *Litton*. When AT&T offered the first of these decisions, the *New York Tel. Co.* decision, into evidence in *Litton*, the trial court rejected it as irrelevant (*Litton* Tr. 11381). The same ruling would have been equally applicable to the other state regulatory decisions which AT&T had intended to introduce and, thus, after the test case on the first decision, offering the others would have been pointless.[29]

[29]Petitioners argue (Pet. at 11) that AT&T intended to introduce just one state regulatory decision in *Litton* by quoting out of context the statement by AT&T's counsel that he would go into "just this one" decision *with the particular witness who was then on the stand.* A review of even the partial *Litton* transcript included in Petitioners' Appendix D makes clear that AT&T's counsel was simply stating that he would limit his examination at that point in the trial to the New York Public Service Commission decision because the witness then on the stand had testified before that state agency (App. D. at 48a). On the transcript page immediately following the pages included in Petitioners' Appendix D, counsel for AT&T made clear that he viewed the trial court's ruling excluding the *New York Tel. Co.* case as broadly applicable to the other state decisions that were included on AT&T's exhibit list, arguing that having permitted Litton to introduce the FCC registration orders, "not letting in state *decisions* would be unbalanced" (*Litton* Tr. 8352) (emphasis supplied).

Finally, Petitioners contend (Pet. at 11) that state regulatory decisions are irrelevant because the FCC in *Telerent*[30] preempted state regulation of interconnection retroactively back to the 1934 enactment of the Federal Communications Act. There is no substance to that claim. First, under the Communications Act, the States continued to share regulatory jurisdiction with the FCC unless and until the FCC issued a preemption order.[31] Clearly, AT&T and its operating companies had to abide by state regulatory policies before *Telerent* was issued and became effective. Indeed, Petitioners' contrary argument directly conflicts with the views of both the Court of Appeals for the District of Columbia Circuit in *Faucett* and the Second Circuit in *Litton* that evidence concerning state regulation is probative of the reasonableness of AT&T's conduct.[32] Moreover, contrary to Petitioners' reading of *Telerent*, that decision did not foreclose the States from making independent determinations that PCAs were reasonable and should be required. The FCC in *Telerent* merely precluded state regulators from prohibiting interconnections then permitted by the FCC and required them to maintain at the minimum the PCA requirement in the post-*Carterfone* tariffs then in force (45 F.C.C.2d at 221).

[30]*Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Utils Comm'n* v. *FCC*, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[31]On numerous occasions prior to *Telerent*, the FCC explicitly acknowledged the *shared* nature of its regulatory jurisdiction over equipment interconnection issues. *See, e.g., Jordaphone* v. *American Tel. & Tel. Co.*, 18 F.C.C. 644, 670 (1954) ("the use of automatic telephone answering devices raises a problem of joint jurisdiction"). The FCC continued to adhere to that view even in initiating its Docket 19528 inquiry into certification of terminal equipment. *Interstate and Foreign MTS and WATS*, 35 F.C.C.2d 539, 541 (1972) ("we should not undertake the final resolution of the issues herein without the closest coordination and cooperation between this Commission and state regulatory agencies which have regulatory responsibility for local and interstate communication services").

[32]*See also Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 664 F.2d 716, 723 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 785 (1983) (evidence of state regulation is relevant to the reasonableness of AT&T's conduct regarding the post-*Carterfone* tariffs).

In sum, the Court of Appeals was correct in holding that crucial evidence was excluded in *Litton* and that evidence may well make all the difference in the trial of this case. Hence, the trial here will not merely be a "replay" of the trial in *Litton*, as Petitioners contend (Pet. 6, 20). AT&T will be able to show that its filing of the post-*Carterfone* tariffs and its opposition to certification—the very conduct at issue here—was not only reasonable, but that it was in the public interest in the judgment of scores of state regulators all over the country who were vitally concerned with interconnection practices.[33] Petitioners have provided no reasoned basis for this Court to intervene to prevent that kind of trial.

II. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT OFFENSIVE COLLATERAL ESTOPPEL WOULD BE UNFAIR WHERE THE *LITTON* JUDGMENT CONFLICTED WITH THE DETERMINATION OF THE SAME ISSUES FOR DEFENDANTS IN *UNITED STATES v. AMERICAN TEL. & TEL. CO.*

As noted above, the Court of Appeals' decision reversing the district court's order rested on multiple grounds that are largely independent. Although Petitioners in their argument challenge the Court of Appeals' independent finding that collateral estoppel would be inappropriate because *Litton* conflicts with the *Noerr-Pennington* determination of Judge Greene in *United States* v. *American Tel. & Tel. Co.*, Petitioners have not properly raised that finding for review. *See* Rule 21.1(a) of the Rules of this Court.[34] In these circumstances, the Writ should be denied, not only because it does not raise a meritorious ground for this Court's consideration, but also because it fails to raise for review the independent bases for the decision below.

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[33] *See, e.g.*, decisions cited at p. 6 n. 11, *supra*.

[34] The Question Presented by Petitioners addresses only that portion of the decision below finding that collateral estoppel was inappropriate because of the erroneous exclusion of state regulatory decisions in *Litton*.

(Footnote continued on following page)

Moreover, even if it were properly before this Court, the holding of the Court of Appeals that collateral estoppel is inappropriate in view of the "stark" inconsistency between Judge Greene's Rule 41(b) decision in the Government case and the contrary determinations of the jury in *Litton* (App. A at 26a-27a) does not warrant this Court's review. The Court of Appeals' holding merely applies established principles in a way that is clearly correct, and none of Petitioners' contentions to the contrary has the slightest merit.[35]

First, Petitioners contend (Pet. at 14-16) that this Court in *Parklane Hosiery, Inc.* v. *Shore*, 439 U.S. 322 (1979), established that application of offensive collateral estoppel could only be precluded if there existed a final "judgment" that was inconsistent with the outcome of the case relied upon for estoppel. Petitioners argue that Judge Greene's ruling constitutes merely an interlocutory "determination" rather than a "judgment" and for that reason does not preclude offensive collateral estoppel.

The Court of Appeals explicitly rejected this argument, noting that nothing in *Parklane Hosiery* supports Petitioners' "arbitrary distinction between judgments and other judicial determinations"

(Footnote continued from previous page)
Nothing in the Question Presented challenges the Court of Appeals' conclusion that collateral estoppel is precluded because *Litton* conflicts with the *Noerr-Pennington* determination in the Government case. Petitioners' discussion of that issue only in their argument is insufficient to raise the issue for review. *See, e.g., General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 177-79 (1938); *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 428-29 (1964); *National Licorice Co.* v. *NLRB*, 309 U.S. 350, 357 n.2 (1940).

[35]Three other district courts have also concluded that this inconsistency precludes giving collateral estoppel effect to *Litton*. *See Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984); *Wrede* v. *American Tel. & Tel. Co.*, C.A. No. 83-283-1-MAC (M.D. Ga. May 30, 1984); *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984).

(App. A at 23a-24a).[36] Moreover, the Court of Appeals did not hold that any mere determination in another case could preclude offensive collateral estoppel (App. A. at 24a-25a). Rather, the Court of Appeals carefully considered the circumstances of Judge Greene's Rule 41(b) decision and concluded that Judge Greene's decision was "sufficiently definite and firm on the *Noerr-Pennington* issue" (App. A at 25a) to be significant for collateral estoppel purposes.

The Court of Appeals' approach to the question is fully consistent with the standards of practical finality that have long been used in federal courts and that have now been adopted by the Restatement (Second) of Judgments §13.[37] Indeed, courts have often held partial adjudications, comparable to Judge Greene's Rule 41(b) order that the Government's charges regarding AT&T's opposition to certification before the FCC be stricken, to be sufficiently final as to be treated as conclusive for collateral estoppel purposes.[38] Clearly, the Court of Appeals' application of

[36]The Court of Appeals also noted (App. A at 24a) that the draft of the Restatement (Second) of Judgments, referenced by this Court in *Parklane* (439 U.S. at 331), used the term inconsistent "determinations," as does the final version of the Restatement (Second) of Judgments §29(4) and comment f. *Cf. Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981) (holding that inconsistent judicial interpretations of the terms of an insurance contract precluded offensive collateral estoppel on the meaning of the disputed contract clause).

[37]*See* Restatement (Second) of Judgments §13 and comment g (for purposes of collateral estoppel the "final judgment" requirement "includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect"). *See also Lummus Co.* v. *Commonwealth Oil Ref. Co.*, 297 F.2d 80, 87-90 (2d Cir. 1961), *cert. denied*, 368 U.S. 986 (1962); *Miller Brewing Co.*, v. *Jos. Schlitz Brewing Co.*, 605 F.2d 990, 996 (7th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980); *Dyndul* v. *Dyndul*, 620 F.2d 409, 411-12 (3d Cir. 1980).

[38]*See, e.g., In re Cenco, Inc. Securities Litigation*, 529 F. Supp. 411, 416 n.5 (N.D. Ill. 1982); *In re Falstaff Brewing Corp. Antitrust Litigation*, 441 F. Supp. 62, 66 (E.D. Mo. 1977). See *generally* 1B J. Moore,

(Footnote continued on following page)

those well-established principles in this case does not merit this Court's review.[39]

Second, Petitioners contend (Pet. at 16) that "Judge Greene's opinion . . . is wholly consistent with *Litton*," citing other portions of Judge Greene's opinion stating that the Government had made out a *prima facie* case. However, Petitioners' attempt to focus attention on those portions of Judge Greene's decision other than his treatment of the *Noerr-Pennington* issues is beside the point.[40] The *Litton* jury findings with respect to the PCA tariff filing and opposition to certification issues rested solely on the jury's finding

(Footnote continued from previous page)
Moore's Federal Practice ¶0.441[4] at pp. 744-47 (2d ed. 1983) (reviewing cases giving collateral estoppel effect to a partial grant of a motion to dismiss, partial summary judgment and other partial adjudications).

[39]In support of their assertion that Judge Greene's Rule 41(b) decision is not significant for collateral estoppel purposes, Petitioners also cite (Pet. at 16) the decision in *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 1011, 1022 (D.C. Cir. 1984). Petitioners contend that the court's holding in *Southern Pacific* that Judge Greene's decision was not final conflicts with the treatment of the decision in *Faucett*. In *Southern Pacific*, however, plaintiffs had sought to impose offensive collateral estoppel based upon those portions of Judge Greene's decision that *denied* AT&T's motion to dismiss, not those portions referred to by the Court of Appeals in *Faucett* which *granted* the motion in part. Thus, the holding in *Southern Pacific* that other portions of Judge Greene's decision were not final for purposes of offensive collateral estoppel in no way conflicts with *Faucett*. Indeed, Petitioners raised this purported conflict between the two panels of the Court of Appeals in seeking rehearing *en banc* of the *Faucett* ruling, and no participating judge of the full court found merit in that argument.

[40]Contrary to Petitioners' representations, Judge Greene never found that *any* of AT&T's conduct challenged by the Government violated the antitrust laws. At the time of the Rule 41(b) decision, Judge Greene explicitly stated that it was "absolutely clear" that he had made no final determination of liability with respect to the Government's remaining allegations and that defendants "may well succeed in disproving everything" established in the Government's case-in-chief (*United States* v. *American Tel. & Tel. Co.*, No. 74-1698 (D.D.C.), Tr. 14,910 (Sept. 11, 1981)). *See also Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 1011, 1022 (D.C. Cir. 1984).

of a sham under the *Noerr-Pennington* doctrine.[41] As the Court of Appeals observed, Judge Greene's *Noerr-Pennington* ruling dismissing the Government's claims is directly inconsistent with the *Noerr-Pennington* determination of the jury in *Litton* imposing liability on defendants for the same conduct (App. A at 26a-27a).

Finally, Petitioners challenge the Court of Appeals' statement (App. A at 27a) that the records in *Litton* and before Judge Greene were "largely the same," asserting (Pet. at 18) that there were some differences in the records in the two cases.[42] However, there will always be some differences in the records of two litigated cases on the same issue. If Petitioners were correct in their assertion that inconsistent determinations could arise only from *identical* records, there would never be a case in which that exception applied. The *Faucett* case is consistent with cases from other circuits that have found inconsistent determinations without requiring exact duplication of all of the evidence in both cases.[43]

[41]Indeed, the jury found that the PCAs themselves were not "unduly expensive, inefficient or unreliable" (*Litton* Jury Interrogatory No. 16(d)).

[42]The Court of Appeals was clearly correct in its conclusion that the inconsistent determinations in *Litton* and the Government case rested upon largely the same facts. The Government case was litigated contemporaneously with the *Litton* proceedings; the *Litton* allegations and evidence constituted a separate "episode" presented by the Government in its case (*see* 524 F. Supp. at 1349 n.40), and Judge Greene ordered that the Government have access to the document discovery taken by Litton of AT&T. *United States* v. *American Tel. & Tel. Co.*, 461 F. Supp. 1314, 1340-41 and n.79 (D.D.C. 1978). The Government's counsel worked closely with Litton's counsel and introduced into the record in the Government case evidence and trial testimony directly from the *Litton* case, including the *Litton* testimony of Mr. deButts and numerous other witnesses. Thus, any evidence contained in the *Litton* record but not in the record of the Government case simply reflects the assessment of the Government's counsel that such evidence was cumulative or immaterial.

[43]*See, e.g., Hardy* v. *Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982); *Crawford* v. *Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir. 1981).

In any event, as the Court of Appeals observed, the evidence introduced in *Litton* included documents that were the same as or similar to documents Judge Green identified as protected by the *Noerr-Pennington* doctrine in his decision dismissing certain of the Government's claims (App. A at 26a).[11]

In sum, the Court of Appeals was correct in concluding that the judgment in *Litton* was inconsistent with Judge Greene's decision in the Government case. Even if Petitioners properly raised this issue for review, they have made absolutely no showing that review of the issue is warranted.

III. REVIEW BY THIS COURT IS INAPPROPRIATE BECAUSE OTHER INDEPENDENT GROUNDS SUPPORT THE REFUSAL OF THE COURT OF APPEALS TO GIVE COLLATERAL ESTOPPEL EFFECT TO *LITTON*.

For the reasons stated above, neither the issue which Petitioners raise in the Question Presented, nor the other matters they address only in their argument warrant this Court's review. In addition, the Court of Appeals' holding that application of offensive collateral estoppel based on the judgment in *Litton* would be inappropriate is supported by grounds that the Court of Appeals did not reach but which further demonstrate both the correctness of its decision and the inappropriateness of review by this Court.

The doctrine of collateral estoppel is premised on an "underlying confidence" in the correctness of the judgment relied upon. *Standefer* v. *United States*, 447 U.S. 10, 23 n.18 (1980); Restatement (Second) of Judgments §29 comment f. In the instant case that "underlying confidence" is wholly lacking because the

[11] Petitioners also point to the fact (Pet. at 18) that Judge Greene held that some *Noerr*-protected evidence might nonetheless be admitted for limited purposes (524 F. Supp. at 1363 n.110). However, as the Court of Appeals recognized (App. A at 26a), the *Noerr*-protected evidence introduced in *Litton* was not admitted for limited purposes but was continuously referred to by plaintiffs in that case as a basis for imposing liability for bad faith submissions to the FCC.

central premise upon which the judgment in *Litton* rested is demonstrably false. Indeed, the *Litton* decision stands discredited by virtually everyone familiar with the regulatory history from which the allegations in *Litton* arise.

The judgment in *Litton* rested upon one critical premise—that the FCC's *Carterfone* decision required AT&T to permit the interconnection of all terminal equipment, including PBXs and key telephone systems, absent an affirmative showing of harm to the telecommunications network, and that the post-*Carterfone* tariffs on their face violated this requirement. Thus, the Second Circuit reasoned that *Carterfone* was applicable to PBXs and key telephone systems (700 F.2d at 810); that both AT&T's post-*Carterfone* tariffs and its opposition to certification represented an intentional violation of what AT&T clearly had to know was its legal obligation following *Carterfone* (*id.* at 794); and that AT&T must have known that its opposition to certification was a "sham," since AT&T knew or should have known that it "had no realistic hope that the FCC would approve the interface device" (*id.* at 811).

Within days of the Second Circuit's decision, former FCC Commissioner Benjamin L. Hooks filed a memorandum with the Second Circuit urging reconsideration of the decision by that court, stating (at 3):

> "[T]he regulatory history of the controversy over customer-owned terminal equipment has been so grossly distorted [in the Second Circuit's *Litton* opinion] that no one who participated in, and knows about, the events of that era would even recognize that that is what the Court is trying to describe."

Shortly thereafter, Bernard Strassburg, the Chief of the FCC's Common Carrier Bureau from 1963 to 1973, and the principal author of the FCC's 1968-73 decisions explaining the meaning of *Carterfone*, specifically rejected *Litton's* view of *Carterfone* and subsequent FCC decisions, stating in deposition testimony in

Phonetele, Inc. v. *American Tel. & Tel. Co.*, C.A. No. CV-74-3566-MML (C.D. Cal.) that *Litton's* reading of *Carterfone* was "certainly not correct" and that he "really can't agree" that AT&T had no realistic hope that the FCC would approve the PCA requirement in Docket 19528 (Strassburg Dep. at 74, 123).

Subsequently, even the Department of Justice, which pursued its own case against AT&T on essentially the same theory as did Litton, which therefore supported Litton's position in this Court, and which can hardly be considered to be a neutral, objective observer in this instance, acknowledged that *Litton* erred in its reading of *Carterfone*. In its *amicus curiae* brief filed at the request of this Court, the Department of Justice pointed out that *Litton* concluded "incorrectly" that *Hush-a-Phone* and *Carterfone* were applicable to the PBXs and key telephone systems at issue in *Litton* (Brief of the United States as *Amicus Curiae* filed December 16, 1983, at 20-21).

Finally, if any doubt concerning the inaccuracy of the premises underlying *Litton* could possibly remain, that doubt was dispelled by the FCC's statement as *amicus curiae* in this case filed in the Court of Appeals on February 24, 1984. In its statement, the Commission stated explicitly that the Second Circuit had "mischaracterized" the *Carterfone* decision by finding it to be applicable to PBXs and key telephone systems (*id.* at 1-2), and further that the Second Circuit's assumption that the post-*Carterfone* tariffs violated the mandate of *Carterfone* was in "error" (*id.* at 3).

Although the Court of Appeals found it unnecessary to reach this issue in its decision below, other courts have expressed reservations about the correctness of the *Litton* decision. In *Phonetele,*[*] the court refused to give collateral estoppel effect to *Litton* on the ground that it had "doubt about the correctness of the *Litton Systems* decisions on the applicability of the [*Noerr-Pennington*] doctrine to the opposition to certification."

[*] *Phonetele, Inc.* v. *American Tel. & Tel. Co.*, 1984-1 Trade Cas. ¶ 65,921 (C.D. Cal. Jan. 19, 1984).

Further, in Glictronix,[46] the court questioned the reliability of the 1975-1976 FCC decisions that had formed the basis of the Second Circuit's opinion in *Litton*. The *Glictronix* court held that collateral estoppel should not be applied to the judgment in *Litton* in part because new evidence indicated that the Chief of the FCC's Common Carrier Bureau between 1974 and 1978, Walter Hinchman, who was responsible for preparing these decisions for the Commission, improperly engaged in a program to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System. The court held that such new evidence drew into question the trustworthiness (and thus the admissibility under Rule 803(8)(C) of the Federal Rules of Evidence) of those FCC decisions finding AT&T's post-*Carterfone* tariffs to be unlawful—decisions which the Second Circuit described as "central" to plaintiffs' claims in *Litton* (700 F.2d at 818).[47]

Under these circumstances, the Writ should be denied because review, and even reversal, of the decision of the Court of Appeals now before the Court might have no practical effect in the case given the existence of grounds that the Court of Appeals did not reach and which fully support the result below.

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[46] *Glictronix Corp.* v. *American Tel. & Tel. Co.*, C.A. No. 82-4447 (D.N.J. Oct. 4, 1984).

[47] The court in *Glictronix* referred particularly to the record developed after the *Litton* verdict in the trial of *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, C.A. No. 78-0545 (D.D.C.). At the conclusion of the *Southern Pacific* case, the district court found (556 F. Supp. 825, 1056-57 (D.D.C. 1983), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984)):

> "The inference is justified that under the direction of Mr. Hinchman, whom the Court found to be lacking in candor and trustworthiness, the staff launched into a program to protect the specialized carriers from competition from AT&T and *to create FCC findings that could be utilized as predicates in antitrust actions against the Bell System.*" (Emphasis supplied.)

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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